STATE OF MICHIGAN

COURT OF APPEALS

KENNETH MITAN and TECORP ENTERTAINMENT,

Plaintiffs-Appellants,

v

NEW WORLD TELEVISION, INC., NEW WORLD DETROIT, INC. d/b/a WJBK-TV CHANNEL 2, RICH FISHER, BILL BONDS, HUEL PERKINS, MIKE REDFORD, MICHAEL VORIS and MORT MEISNER,

Defendants-Appellees.

UNPUBLISHED
November 12, 2002

No. 225530
Wayne Circuit Court
LC No. 97-710748-NZ

Before: White, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's orders denying their motion to disqualify defendants' counsel and granting defendants summary disposition in this case alleging defamation, intentional infliction of emotional distress, invasion of privacy, tortious interference with business relations, and negligence, relating to WJBK-TV "Hall of Shame" broadcasts concerning plaintiffs. We affirm in part and reverse in part.

I

This case arises from several "Hall of Shame" segments defendant WJBK-TV2 broadcasted that reported unfavorably on plaintiffs' business practices with regard to Lucky's Billiards and Brew (Lucky's), a bar in Dearborn Heights.[1] The broadcasts occurred on April 10, 1996, May 8, 1996 and August 2, 1996. The April 10, 1996 segment concerned plaintiff Mitan's bouncing of paychecks to Lucky's employees. The broadcast also reported that Mitan was delinquent on property taxes and payments to the person from whom Lucky's was purchased, and that Lucky's management sent employees to purchase liquor at retail stores when the bar ran

[1] Plaintiffs' complaint states that plaintiff Tecorp is a limited partnership doing business as Lucky's Billiards and Brew. Kenneth Mitan had a financial interest in Tecorp. Defendants are companies associated with, and employees of, WJBK-TV Channel 2.

out of liquor, which violated state liquor laws. The May 8, 1996 segment concerned additional allegations that Mitan wrote bad checks, including the failure to pay for pool tables delivered to Lucky's, which resulted in litigation. The August 2, 1996 segment concerned the court-ordered repossession of the pool tables, and charged that Lucky's used the tables free of charge for eight months.

At the time of the broadcasts, attorney Timothy Knowlton of defense counsel Honigman, Miller, Schwartz & Cohn's (HMS&C) Lansing office represented Kenneth Mitan and several other parties in three litigation matters arising from their default on a purchase agreement involving three shopping centers located in Holt, Haslett and St. Johns, Michigan (hereafter "Frandorson" litigation). Knowlton's representation concluded before plaintiffs filed this action. When another HMS&C attorney, Herschel Fink, appeared as defense counsel in the instant case, plaintiffs filed a motion to disqualify Fink, alleging a conflict of interest in light of Knowlton's prior representation of Kenneth Mitan in the Frandorson litigation. The circuit court denied the motion to disqualify and subsequently granted summary disposition in defendants' favor.

II

Plaintiffs first argue that the circuit court erred in denying their motion to disqualify defense counsel in light of HMS&C's prior representation of plaintiff Mitan in the Frandorson litigation, constituting a conflict of interest. We find no error.

The general rule regarding conflict of interest involving a former client is stated in the Michigan Rules of Professional Conduct (MRPC) 1.9(a). *In re Osborne,* 459 Mich 360, 367; 589 NW2d 763 (1999). MRPC 1.9(a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

MRPC 1.9(c) states:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known . . . .

The party moving for disqualification has the burden of demonstrating a conflict of interest and specific prejudice. *Kubiak v Hurr,* 143 Mich App 465, 471; 372 NW2d 341 (1985). Plaintiffs have failed to show that Herschel Fink's representation of defendants in this action constitutes a conflict of interest because of Timothy Knowlton's former representation of

plaintiff Kenneth Mitan and several other parties[2] (the Mitan defendants) in prior litigation involving the failed purchase transaction for the Lansing area shopping centers.

The official comment to MRPC 1.9 explains that "[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." Knowlton, of HMS&C's Lansing office, represented the Mitan defendants in litigation ancillary to a failed real property transaction, when the plaintiff property owner filed actions against the Mitan defendants because of title-clouds they caused on the shopping centers, obstructing the plaintiff's sale of the properties. See *Frandorson Properties v Mitan*, unpublished opinion per curiam of the Court of Appeals, issued 12/13/96 (Docket No. 182423). Knowlton's representation is not "substantially related" to the current litigation, which involves defendants' reporting of (1) Mitan's business dealings with respect to a separate company, Tecorp, and (2) business practices surrounding the operation of Lucky's Billiards and Brew in Dearborn Heights. While the topic of the television broadcasts may have arisen tangentially in the Frandorson litigation, it was not the subject of dispute between the Frandorson plaintiffs and Mitan.

Further, Knowlton's representation, which apparently began in the latter part of 1994, *id.* at slip op p 5, and continued through the appeal in this Court, had effectively ended before the action in the instant case was filed. An attorney may undertake to represent a new client against a former client if all business ties have been severed, the subject matter of the current representation is not substantially related to a matter in the former representation, and there is no confidential information received from the former client that is relevant to representation of the current client. *Barkley v Detroit*, 204 Mich App 194, 203-204; 514 NW2d 242 (1994). To the extent that plaintiffs allege a conflict based on Knowlton's receipt of confidential information relevant to this case, plaintiffs have failed to support these allegations with specific evidence other than documents that have already been made public. Plaintiffs had separate counsel handling the "Hall of Shame" matters at the time Knowlton represented Mitan in the Frandorson Properties litigation—further evidence that any contact with Knowlton concerning the broadcasts was merely tangential to the Frandorson litigation.

Even were we convinced that plaintiffs had demonstrated a conflict of interest warranting disqualification, we find no error requiring reversal. Plaintiffs have failed to show that they were prejudiced. *In re Osborne, supra* at 369; *Feaheny v Caldwell*, 175 Mich App 291, 309; 437 NW2d 358 (1989).

III

Plaintiffs raise numerous claims of error with regard to the circuit court's appointment of a special master for discovery, and various discovery sanctions imposed by the master and adopted by the circuit court.

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[2] Keith Joseph Mitan; Teresa Frances Mitan; Mitan Properties Company, V; Mitan Properties Company, VI; and Mitan Doublewood Ancillary Control Section, Inc.

We conclude that notwithstanding plaintiff's stipulation to the order appointing the special master, reversal is required because the circuit court was without authority to delegate its judicial functions to the special master. *Carson Fisher Potts v Hyman,* 220 Mich App 116; 559 NW2d 54 (1996); *Oakland County Prosecutor v Beckwith*, 242 Mich App 579; 619 NW2d 172 (2000).

A

Plaintiffs filed their complaint in the instant case in April 1997. The circuit court judge heard a number of motions, including for summary disposition brought by defendants and discovery-related motions, plaintiffs amended their complaint twice, various scheduling conferences were held, and mediation was adjourned before the parties stipulated in January 1999 to the appointment of a special discovery master. The court entered the order appointing the special master on February 1, 1999. The order states:

> This Court having fully reviewed the matter, including discovery motions filed by both parties in this case, finds the appointment of a Special Master is consistent with the interests of justice and the ends of judicial economy. Therefore, pursuant to MCR 2.401 and 2.302 and the stipulation of the parties,
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> IT IS HEREBY ORDERED that Stephen Landau . . . be appointed as Master in the above matter, **vested with authority to issue binding decisions and rulings on all discovery issues on which the Court has not already finally ruled, including but not limited to the course, scope and length of depositions, productions of documents and answers to interrogatories."**
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> IT IS FURTHER ORDERED that the parties shall share equally in the payment of fees for his services. [Emphasis added.]

In March 1999, plaintiffs' counsel filed a motion to withdraw, defendants objected, and the circuit court denied it.

The special master issued sixteen orders. Four sessions before the special master were transcribed, the first on August 11, 1999, after which his eighth order entered, ordering that plaintiffs produce documents responsive to two discovery requests; that plaintiffs bear costs of production of the documents, and defendants bear copying costs, if any; that the hearing on defendants' third motion to compel be continued to August 18, 1999; that plaintiff must show good cause at the August 18 hearing for non-production of responses to defendants' request 17, "in lieu of which argument on sanctions will proceed."

The "Opinion and Tenth Order of Special Master," entered August 25, 1999, stated in pertinent part:

> Presently before the Special Master is defendants' Motion for Discovery Sanctions Regarding Damages. . . . Pursuant to the Ninth Order of Special Master, entered August 19, 1999, defendants have most recently submitted Defendants' Request for Discovery Sanctions. The statement of facts contained in that Request accurately sets forth the history with respect to the status of discovery

regarding plaintiffs' damages and is hereby adopted by the Special Master and incorporated into this opinion.

Plaintiffs have attempted to ameliorate their failure to show good cause [for failing to "detail all damages . . . plaintiffs claimed to have suffered as a result of defendants' conduct, including the amounts of the alleged damages and the method of computing the alleged damages"] by submitting the undated affidavit of Philip J. Crowley. . . Mr. Crowley asserts that the Michigan State Police, which executed a certain search warrant, would permit access to the records seized for review and photocopying. Apparently within the documents seized are all of the records necessary for plaintiffs to fully answer discovery request number 17 which relates to damages.

* * *

Although the Crowley affidavit was timely filed with the Special Master, a copy was not served upon defendants. On August 23, 1999, the Special Master faxed the Crowley affidavit to defendants' counsel and granted a one-day extension for their response. At 6:10 p.m. on August 24, 1999, counsel for plaintiffs telephoned the Special Master and advised he had just returned to his office to find defendants' Request. Plaintiffs' counsel was granted until 5:00 p.m. on August 25, 1999, to file and serve his final reply. A reply was not received.

The Crowley affidavit standing alone is insufficient to avoid the imposition of discovery sanctions with regard to discovery request number 17.

A variety of factors have been set forth to guide courts in the imposition of appropriate sanctions. Defendants have directed the Special Master to the case of *Dean v. Tucker,* 182 Mich. App. 27 (1990). . . . However, the Special Master finds the more appropriate authority to be *Richardson v. Ryder Truck Rental,* 213 Mich. App. 447; 540 N.W. 2d 696 (1995). The Special Master reaches this conclusion because of the *Richardson* court's direction to "consider the circumstances of the case to determine whether a drastic sanction, such as dismissing a claim, is appropriate." Citing *Dean v. Tucker* at 182 Mich. App. 32. The *Richardson* court goes on to indicate that

> The sanction imposed in this case amounted to the dismissal of a major component of Charles' claim. We do not believe that so drastic a sanction as dismissal is warranted where there has been no finding of a knowing concealment. 213 Mich.App. 452-453.

In this instance, the Special Master is compelled to find that having been given every opportunity to provide the requisite information sought in discovery request number 17, failure to do so is willful, *i.e.*, it is tantamount to a "knowing concealment." That finding, coupled with the list of factors referred to in *Dean* and in *Richardson* compels the following order.

> The issues of willfulness and of the plaintiffs' history with regard to discovery failings has already been addressed. The obvious prejudice to defendants is that without this information they cannot adequately prepare for mediation or trial. Plaintiffs have been constantly tardy in their discovery responses, no doubt in part occasioned by the complexity of the claims asserted, but nevertheless their own burden. No satisfactory attempt to timely cure is apparent from the record before the Special Master. Penultimately, and most critically, the sanction to be imposed appears to be, although substantial, nevertheless the minimum which can be imposed. Finally, the Special Master has not been directed to any other factor to be considered which would result in a different conclusion. Therefore,
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> IT IS HEREBY ORDERED That plaintiffs are barred from offering the testimony of any non-party witness at trial on the issue of damages.
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> IT IS FURTHER ORDERED That plaintiffs are barred from offering any documents at trial which are not provided to defendants prior to October 1, 1999, the present adjourned discovery cut-off date.

The special master's Eleventh Order granted in part defendants' motion for sanctions, and in connection therewith found that plaintiffs had not produced documents in response to defendant's discovery requests 29 and 30, and that "plaintiff Kenneth Mitan engages in litigation to avoid the payment of debts with respect to himself and businesses which he controls. Plaintiff Kenneth Mitan is barred from offering documentary evidence to the contrary at trial." The eleventh order also set a deposition schedule.

The Twelfth Order overruled Keith Mitan's (Kenneth's brother) objections, which had been filed with the court, to having his deposition videotaped, and stated that if plaintiff Tecorp failed to produce Keith Mitan for deposition, all complaints of Tecorp's shall be stricken and a judgment of no cause of action shall enter. The Thirteenth Order stated that although Keith Mitan appeared, he refused to submit to deposition, thus Tecorp's complaints were stricken and a judgment of no cause of action entered in favor of defendants. The Fourteenth Order found that Theresa Mitan, an employee of plaintiffs, and Keith Mitan were required to be produced for deposition by plaintiffs without the necessity of subpoena or witness fees; ordered that Kenneth Mitan was barred from offering any testimony or exhibits at trial relating to Tecorp; found that "Kenneth Mitan has suffered no economic damages and is prohibited from introducing any evidence of economic damages at trial," and ordered that "because of the non-production of Theresa Mitan for deposition . . . the Special Master finds that Kenneth Mitan cannot be defamed by publication of any report that bad checks were issued, directly or indirectly, by either plaintiff."

B

On October 8, 1999, the special master filed the "Motion of Special Master for Adoption of Orders and Findings of Fact and for the Ex-Parte Issuance of an Order to Show Cause; Notice of Hearing and Proof of Service," stating:

> 3. Pursuant to the order of this Court, the Special Master:

(a) Conferred with the parties;

(b) Scheduled and managed the exchange of discovery;

(c) Received and ruled on various motions of the parties regarding the adequacy of discovery responses;

(d) Issued written orders confirming his decisions regarding discovery matters;

(e) Made specific findings of fact relative to discovery matters presented to him; and

(f) Issued orders for the payment of the Special Master's fees and costs.

4. The Special Master entered 16 Orders. No objections to any of the orders were filed, nor are any motions for rehearing or reconsideration unresolved at the date hereof.

5. Four hearings before the Special Master were held on the record.

* * *

9. Hearing on this motion will conclude the services of the Special Master.

THEREFORE, Stephen M Landau, Special Master, requests:

(a) That the 16 orders entered by the Special Master by [sic] adopted as and for the orders of this Court.

(b) That the specific findings made by the Special Master contained in those orders be adopted as and for the findings of this Court.

(c) That in the event any further orders are entered by the Special Master prior to hearing on this motion, that those orders and the findings contained therein also be adopted as and for the orders and findings of this Court.

Defendants filed a concurrence in the special master's Motion for Adoption of Orders and Findings of Fact. A hearing was set for October 29, 1999.

On October 14, 1999, plaintiffs' counsel filed in the circuit court a motion to cancel mediation (at that point scheduled for October 25, 1999), in which plaintiffs stated that "the Special Master has made certain rulings regarding issues of fact concerning damages which in essence eliminate all of Plaintiff's damage claims," and that after entry of the Special Master's orders, plaintiffs would "commence appeals" on many of the Special Master's rulings, including his ruling striking Tecorp's complaint and entering a judgment of no cause of action in defendants' favor (Twelfth Order), and his ruling that Kenneth Mitan suffered no economical

damages and prohibiting Mitan from introducing any evidence of economic damages at trial (Fourteenth Order).

On October 27, 1999, plaintiffs filed Objections to Entry of Specific Orders of Special Master, reiterating the challenges to the rulings made in their motion to adjourn mediation, and adding challenges to the master's order barring plaintiffs from "offering the testimony of any non-party witness at trial on the issue of damages," the master's sanction of striking Tecorp's complaints and entry of judgment of no cause of action in defendants' favor against Tecorp, and the master's finding that "Kenneth Mitan cannot be defamed by publication of any report that bad checks were issued, directly or indirectly, by either plaintiff," on the basis of the non-production of Theresa Mitan (Kenneth's and Keith's mother).

At the October 29, 1999 hearing, the circuit court granted the special master's motion to adopt the special master's orders. Plaintiffs' counsel stated that he had objections to various orders. The circuit court heard only one of plaintiffs' objections (to the tenth order) before adopting the special master's orders in toto. The court then allowed plaintiffs to state their additional objections on the record (and also heard defendants' counsel's responses), but only to "make a record." The hearing transcript indicates that the circuit court did not consider the merits of plaintiffs' objections or "rehear" the parties' arguments.

The circuit court entered an order on November 14, 1999 adopting the special master's orders and findings of fact. Defendants filed a motion for summary disposition. At the hearing on defendants' motion defense counsel stated that the motion was just a formality, because the circuit court's adoption of the special master's orders had "pretty much disposed" of the case. The circuit court granted the motion, dismissing all of plaintiffs' claims.

C

We conclude that reversal of the challenged orders is required notwithstanding plaintiffs' stipulation to the order appointing the special master. As plaintiffs point out on appeal, the *Carson* Court relied on *Brockman v Brockman*, 113 Mich App 233; 317 NW2d 327 (1982), in which the parties had stipulated to the appointment of a former circuit court judge to sit as an acting judge to hear all the disputes involved in the lawsuit. *Id.* at 235.

In *Brockman,* on appeal, the plaintiff at oral argument challenged for the first time the authority of the circuit court and the parties to authorize the former judge to sit as a court and make findings of fact and conclusions of law. *Id.* at 236-237. This Court not only addressed the argument, but reversed and remanded, declining to review the matter on the merits:

> This Court granted the parties additional time in which to submit briefs on this issue. After a review of the arguments raised by both parties and the law of this state, this Court reluctantly agrees with plaintiff that no authority exists to justify the appointment of former judge Sullivan as an acting circuit court judge.
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> The Supreme Court is empowered by the Michigan Constitution to authorize persons who have been elected and have served as judges to perform judicial duties for limited periods or specific assignments. Const 1963, art 6, § 23. The Legislature has enacted certain statutes to allow the Court to implement that

> authority. . . . There are no constitutional or statutory provisions giving a circuit court judge the power to appoint a retired judge or any other person to sit as a court in a civil action. In fact, the constitution denies such authority. Const 1963, art 6, § 27. Thus, Judge Hausner was without any constitutional or statutory authority to appoint former judge Sullivan to sit as the court and try this matter.
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> * * *
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> [Defendants also argue] that plaintiff should be estopped from challenging former judge Sullivan's authority because he proceeded to trial without raising any challenge. They contend that plaintiff has waived any challenge to former judge Sullivan's authority. They rely upon two Michigan Supreme Court decisions to support their position. *Landon v Comet*, 62 Mich 80; 28 NW 788 (1886), *Gunn v Gunn*, 205 Mich 198; 171 NW 371 (1919). In *Landon*, a circuit judge, acting as a probate judge, conducted hearings and entered orders in the probate court although there was nothing in the record to indicate why he was acting as a probate judge. On appeal, his authority to so act was challenged. The Supreme Court held that because a statute had authorized a circuit judge to act as a judge of the probate court in certain specified cases and because he did act with the consent and acquiescence of the defendants, they could not challenge his authority on appeal. In the instant case, there is no statute giving Judge Hausner the authority to appoint or giving former judge Sullivan the authority to sit as a circuit judge.
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> In *Gunn*, a statute specifically provided that although a judge could not sit as a court in any cause in which he was related within the third degree of consanguinity to the attorneys of any party, any objection to the judge's availability to sit would be deemed waived unless a written objection was filed prior to the commencement of the trial or hearing. No objections were filed and, thus, by the very terms of the statute, any objection was waived. In the instant case, however, there is no statute authorizing former Judge Sullivan's appointment and no provision waiving any challenge if not made prior to trial. [*Brockman, supra* at 237-239.]

The defendants' final argument in *Brockman, supra,* was that the case "should be remanded solely for the purpose of having Judge Hausner review the findings and conclusions and enter a judgment thereon." 113 Mich App at 239. This Court disagreed, concluding that appellate review of the merits was not appropriate:

> All orders and the judgment in the instant case were entered by Judge Hausner, but reflected the findings and conclusions of former judge Sullivan. This Court, however, does not perceive the defect to lie in how the orders and judgment were entered. The defect lies in the intent of the parties when they sought and received Judge Hausner's order pursuant to their stipulation.
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> If the parties agreed to a procedure by which a consent judgment could be reached with the assistance of former judge Sullivan as mediator, then appeal to this Court could not be "from the findings, rulings, and final judgment of Judge Sullivan."

> If the parties agreed to have their controversy resolved by arbitration, and the instant case does resemble statutory arbitration, MCL 600.5001 *et seq.*, . . . then the scope of this Court's review would be much less extensive than that contemplated by the parties. GCR 1963, 769.
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> It appears however that counsel, acting in the interests of their clients, attempted to avoid the serious business and economic consequences that could result from trial delay by having former judge Sullivan officially act as a circuit judge over their controversy. The Court concludes that Judge Hausner was without authority to appoint former judge Sullivan to sit as an acting judge for the reasons previously stated. Appellate review as originally sought is denied.
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> Reversed and remanded. [*Brockman, supra*, 113 Mich App at 239-240.]

In *Carson,* the plaintiff objected to appointment of the experts in the trial court, but on appeal, it was the defendant that argued that the appointment was unlawful. This Court agreed, vacating the order appointing the expert witnesses and the order compelling the defendant to pay for the services of the expert witnesses, on the basis that the court's appointment was not authorized by law. *Carson, supra* at 124. This Court addressed whether the defendant waived the issue by not objecting below to the order appointing the experts**,** and concluded that the defendant had raised the issues below in motions brought after the order of appointment, that were not ruled on by the trial court, and that the Court could review the issue, as it was one of law and the facts necessary for its resolution had been presented. *Carson, supra* at 119.

This Court in *Beckwith, supra*, followed (with reservations) *Carson, supra*, because it was required to under MCR 7.215(H)(1). A majority of this Court later chose not to convene a special panel to resolve any potential conflict between *Beckwith* and *Carson, supra*. See *Oakland County Prosecutor v Beckwith,* 242 Mich App 801; 619 NW2d 182 (2000). In *Beckwith,* 242 Mich App at 580-581, the plaintiff objected to the appointment of the special master and the plaintiff brought the appeal after being ordered to pay a portion of the special master's fees. *Id.* at 580-581. The *Beckwith* Court noted:

> Plaintiff brought the present action asserting nearly three hundred claims under the Michigan Consumer Protection Act… Over plaintiff's objection**,** the court appointed a special master to assist the court in this complex litigation. . . . Later, the trial court ordered plaintiff to pay for a portion of the special master's services. On appeal, plaintiff argues that the trial court's order appointing the special master was unlawful and, thus, the order directing payment for the special master's services must be reversed. We review questions of law de novo.
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> Resolution of the issue at hand is governed by this Court's prior decision in *Carson, supra*, in which the trial court appointed an expert witness pursuant to MRE 706 to " ' make findings of fact, conclusions of law and a final recommendation and proposed judgment as to the disposition of [the] matter . . . . ' " *Carson, supra* at 118. The expert was given the authority to hire a certified public accountant to assist him and, in addition was given the duties

> to review all motions and submit findings of fact to the court before the scheduled hearing date, to require the production of evidence, to issue subpoenas through the court, to conduct and regulate miscellaneous proceedings, to examine documents and witnesses, and to prepare final findings of fact and recommendations for judgment. The order permitted the parties to file written objections to the final findings and recommendations and permitted the court to adopt the expert's recommendation and judgment, to modify the recommendation, or to refer the recommendation to the expert with further instructions. [*Id.* at 121.]

On appeal, the defendant argued the trial court did not have the authority to appoint such experts under either MRE 706 or the Michigan Constitution because the assigned duties and responsibilities essentially made them special masters rather than expert witnesses. *Carson, supra* at 118-119. Citing Const 1963, art 6, § § 1 and 27, the *Carson* Court agreed, explaining:

> Although the Supreme Court is empowered by the Michigan Constitution to authorize persons who have been elected and have served as judges to perform judicial duties for limited periods or specific assignments, Const 1963, art 6, § 23, there are no constitutional or statutory authorities permitting a circuit court judge or any other person to sit as a court in a civil action. Rather, Const 1963, art 6, § 27 specifically prohibits such action. . . .
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> * * *
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> We agree with defendant that there is no constitutional authority for the trial court to delegate specific judicial functions to an "expert witness." It is within the peculiar province of the judiciary to adjudicate upon and protect the rights and interests of the citizens and to construe and apply the laws. . . . Thus, **the trial court could not delegate its functions of making conclusions of law, reviewing motions, requiring the production of evidence, issuing subpoenas, conducting and regulating miscellaneous proceedings, examining documents and witnesses, and preparing final findings of fact.** Although this is what the trial court's order purports to do, the court cannot appoint an expert witness to perform judicial functions. Accordingly, the **trial court was without constitutional authority to delegate its specific judicial power** to an expert witness. [*Carson, supra* at 120-122.]

The *Carson* Court further held that the trial court's order appointing an expert witness "exceeded the authority implicit in MRE 706 by requiring the expert to perform duties outside the scope of the duties of an expert witness and within the purview of the court." *Id.* at 123-124.

II

> In the present case, the special master argues that *Carson* is distinguishable. We disagree and conclude the differences between the cases are immaterial. In *Carson,* the trial court cited MRE 706 as authority for the appointment of the special master; in this case the court relied on MCR 1.105. However, neither the rule of evidence nor the court rule expressly authorizes such an appointment. Most importantly, **in both cases, the master's proposed findings of fact and conclusions of law were mere recommendations to the trial court**. . . Further, the order in *Carson,* like the order herein appointing the special master, "**permitted the parties to file written objections to the final findings and recommendations and permitted the court to adopt the expert's recommendation and judgment, to modify the recommendation, or to refer the recommendation to the expert with further instructions."** *Id.* at 121. Consequently, these similarities bind our disposition of the present matter to the result obtained in *Carson, supra.*
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> However, were we not compelled to follow *Carson* by virtue of MCR 7.215(H), we would hold the circuit court possesses the requisite, albeit implicit, authority to appoint a special master **as long as the assigned duties no not unduly intrude on the exclusive domain of the court to perform judicial functions. [***Beckwith, supra* at 581-584. Emphasis added.]

In *Carson* and *Beckwith,* this Court concluded that even where, as here, the parties could object to the final findings and recommendations of the expert/special master and even where the order of appointment permitted the court to adopt the expert's recommendation and judgment, when the special master's actions crossed over into judicial functions, they were unauthorized by law. In the instant case, it is apparent that actual judicial functions were delegated to the special master, and that the court's decision was based on the master's recommendations. To the extent that the special master's orders were stipulated to, the special master's involvement is irrelevant; to the extent that plaintiff does not challenge the orders on appeal, they should not be disturbed. However, plaintiff did not waive all objections to having his case, in essence, dismissed by the special master by agreeing to the order appointing the master. *Carson, supra; Brockman, supra.*

IV

Plaintiff argues that even if the appointment of the special master was proper, the special master exceeded the authority the circuit court gave him. Plaintiff argues that the special master's imposition of sanctions, including barring the testimony of witnesses, issuing findings of fact adverse to plaintiffs, and ultimately having judgment entered against plaintiffs on their claims exceeded the authority granted him. If the order appointing the master is read narrowly, it would appear that the master indeed acted beyond his appointment, as the order does not address the imposition of sanctions.

Plaintiff argues that a trial court must hold an evidentiary hearing and examine other alternatives on the record before dismissing a claim as a discovery sanction. Plaintiff notes that the special master did not hold these hearings on the record as required, that the special master lacked constitutional authority to hold such hearings and that the circuit court did not authorize

the master to hold such hearings, and that therefore, even the order appointing him lacked authority to impose discovery sanctions. We agree that the master's orders imposing sanctions were improper for this reason as well.

We affirm the circuit court's denial of plaintiffs' motion to disqualify counsel. With regard to the special master, we reverse the challenged orders and remand for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen